

**BEFORE THE
CASE REVIEW PANEL**

In The Matter of Amy Wilson,)	
Petitioner)	
and)	CAUSE NO. 010209-11
The Indiana High School Athletic Assoc., Inc.,)	
Respondent)	
)	
Review Conducted Pursuant to)	
I.C. 20-5-63 <i>et seq.</i>)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Procedural History

Petitioner is presently a 19-year-old senior enrolled in Lewis Cass High School in the Southeastern School Corporation. She is active in her school in a number of areas, including athletics. Although she has played basketball in the past, her primary sport is softball, where she plays catcher. Softball is a sport sanctioned by Respondent and played in the spring. Unfortunately, she will turn 20 years of age on March 22, 2001. Under the Indiana High School Athletic Association's (IHSAA's) rules, the first week of authorized contests for the 2001 softball season begins March 19, 2001, with the softball tournament finals scheduled to begin on June 8, 2001.¹ **Rule C-4-1**, also known as the "Age Rule," reads as follows:

A student who is or shall be twenty (20) years of age prior to or on the scheduled date of the IHSAA state finals in a sport shall be ineligible for interschool athletic competition in that sport; a student who is nineteen (19) years of age on the scheduled date of the IHSAA state finals in a sport shall be eligible as to age for interschool athletic competition in that sport.

¹The Respondent has promulgated a series of by-laws as a part of its sanctioning procedures for interscholastic athletic competition. Some by-laws apply to specific genders ("B" for Boys; "G" for Girls), but most of the by-laws are "common" to all potential athletes and, hence, begin with "C." **Rule 107** applies to softball, while **Rule 101** are provisions that apply to all Girls' sports, detailing dates for authorized practices and contests. All references herein are to the IHSAA's By-Laws for the 2000-2001 school year.

There is no dispute as to the facts in this situation. Petitioner acknowledges her age and the fact that she will be twenty years of age prior to the scheduled date for the state finals in softball. A strict application of **Rule C-4-1** would render her ineligible. Petitioner, however, believes that her circumstances should be considered and that Respondent's "Hardship Rule" should be applied.² However, Respondent's By-Laws prohibit the application of the "Hardship Rule" to the "Age Rule." See **Rule C-17-8.1**.

Petitioner and Lewis Cass High School requested a determination of eligibility by Respondent. On November 13, 2000, Respondent, through its Commissioner, advised Petitioner that, under the Age Rule, she would not be eligible to participate in softball because she would turn 20 years of age prior to the beginning of the 2001 softball tournament. Respondent, by the terms of its "Hardship Rule," could not apply this rule to the Age Rule. The matter was appealed to the Respondent's Executive Committee under **Rule C-17-4**. A hearing was held on January 29, 2001. A written decision was issued on February 1, 2001, upholding the Commissioner's decision, denying Petitioner eligibility to participate in softball. The Petitioner thereafter initiated this appeal to the Case Review Panel (CRP).

APPEAL TO THE CASE REVIEW PANEL

Petitioner sought review of the Respondent's final decision by initiating the instant action before the Case Review Panel (CRP), created by P.L. 15-2000, adding I.C. 20-5-63 *et seq.* to the Indiana Code. The CRP is a nine-member adjudicatory body appointed by the Indiana State Superintendent of Public Instruction. The State Superintendent or her designee serves as the chair. The CRP is a public entity and not a private one. Its function is to review final student-eligibility decisions of the IHSAA, when a student, parent or guardian so requests. Its decisions are to be student-specific, applying only to the case before the CRP. The CRP's decision does not affect any By-Law of the IHSAA.

²**Rule C-17-8** is the IHSAA's "Hardship Rule." Generally, the "Hardship Rule" allows the IHSAA "to set aside the effect of any Rule [with some exceptions] when the affected party establishes, to the reasonable satisfaction of [the IHSAA], all of the following conditions are met:

- a. Strict enforcement of the Rule in the particular case will not serve to accomplish the purpose of the Rule;
- b. The spirit of the Rule has not been violated; and
- c. There exists in the particular case circumstances showing an undue hardship that would result from enforcement of the Rule." **Rule C-17-8.1**.

The IHSAA, on its own initiative, can invoke the "Hardship Rule," but a member school cannot. **Rule C-17-8.2**. However, neither the IHSAA nor any of its member schools can apply the "Hardship Rule" to several eligibility Rules, including **Rule C-4-1**, the "Age Rule." See **Rule C-17-8.1**.

Petitioner initiated this review through a facsimile transmission received on February 13, 2001, by the Indiana Department of Education on behalf of the CRP.³ Both Petitioner and the Respondent were advised on February 14, 2001, of their respective hearing rights. Petitioner was presented with forms to permit or deny the disclosure of student-specific information that, in effect, would make the review hearing by the CRP open to the public. Petitioner elected to have the hearing open to the public.⁴

The parties were advised thereafter of the date, time, and place for the conduct of the review hearing. The review hearing was set for March 1, 2001, at the First Floor Conference Room, 251 E. Ohio St. Notice of the review hearing was posted, as required of public agencies by Indiana's Open Door Law, I.C. 5-14-1.5 *et seq.* CRP members were provided with copies of the record as established before the IHSAA. Petitioner appeared in person and by her parents. Respondent appeared by counsel and its Commissioner.

Respondent, on February 23, 2001, filed a Motion for Summary Judgment, which was not received by Petitioner until February 26, 2001. Motions for Summary Judgment are permitted under Administrative Orders and Procedures Act (AOPA). See I.C. 4-21.5-3-23. Because there was insufficient time for Petitioner to respond and for the CRP to post notice of a meeting prior to considering the Motion for Summary Judgment and any Response thereto, the CRP set the Motion for oral argument at the time, date, and place already reserved for hearing. The parties were advised that should the Motion not be granted, the parties should be prepared to present their respective cases.

Following oral argument and discussion by the CRP, the Motion was denied. However, a critical issue was raised regarding the legal effect of Respondent's By-Laws and whether the CRP is required to adhere to these By-Laws or whether state—and possibly federal—law dictate otherwise. Because this is the first year for the CRP, such issues will arise and will need to be addressed as they do.

THE LEGAL EFFECT OF THE RESPONDENT'S BY-LAWS

As recited above, the Case Review Panel was created by the Indiana General Assembly under P.L. 15-2000, which is found in the Indiana Code beginning at I.C. 20-5-63-1 *et seq.* The provisions are

³The Indiana Department of Education received on February 9, 2001, a facsimile transmission from Lewis Cass High School advising that Petitioner wished to appeal to the CRP and requesting additional information in this regard. Because the school cannot initiate such an appeal, the Petitioner and her parents faxed their request for review on February 13, 2001.

⁴CRP Members Gerald McLeish and Mark Mason were unable to attend this review and did not participate in the decision.

not entirely without some ambiguity. The State Superintendent of Public Instruction was designated as the appointing authority. I.C. 20-5-63-7(a). Respondent was charged with “all costs attributable to the operation of the panel, including travel and per diem for panel members.” I.C. 20-5-63-7(e). After the law was passed, the State Superintendent sought the advice of the Public Access Counselor, as created by I.C. 5-14-4 *et seq.*, as to the exact nature of the Case Review Panel (public entity or private entity). By extension, the State Superintendent asked whether the CRP, if a public entity, was obliged to adhere to the Open Door Act, I.C. 5-14-1.5 *et seq.*, and the Access to Public Records Act, I.C. 5-14-3 *et seq.* The Public Access Counselor advised that the CRP was, indeed, a public entity subject to the Open Door Act and the Access to Public Records Act, but that, due to its adjudicative nature, there would be limitations on public access to the proceedings or the record generated therein where certain state and federal laws regarding the confidentiality of personally identifiable information from a student’s educational record are implicated. The Case Review Panel is an extension of the State and not an extension of the Respondent.

Prior to the resolution of the nature of the CRP, the Respondent revised its By-Laws to craft rules for the conduct of the CRP, believing that the legislature intended the CRP to be an extension of the Respondent. For the most part, these By-Laws reflect the legislative language. See **Rule C-17-10**. However, Respondent added one provision that is not in the legislative language, to wit:

The Panel shall be bound by these procedural rules and the substantive rules of the Association when reviewing any final decision of the Association.

Respondent, in its oral argument, indicated that the CRP was bound by this By-Law. The CRP indicated that it is not bound by either the By-Laws addressing the CRP nor by the language of the “Hardship Rule” that proscribes its application to the “Age Rule.” However, the CRP added that, because it must conduct its proceedings pursuant to the Administrative Orders and Procedures Act (AOPA), I.C. 4-21.5 *et seq.*, it is not free to ignore the By-Laws, especially ones that serve an obvious rational purpose such as the Age Rule, and make student-specific decisions based upon whimsy. The burden remains with the Petitioner to provide substantial evidence that would justify piercing the Age Rule and permitting Petitioner to participate in the particular athletic endeavor that is sanctioned by Respondent.

It is not just the misunderstanding between the nature of the CRP vis-a-vis Respondent’s By-Laws but the application of other laws, notably federal laws, that may come into play. Respondent, in its Motion for Summary Judgment, seems to acknowledge that there may be some effect on the By-Laws by the Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq.*, as implemented by 34 CFR Part 300 and, in Indiana, through the Indiana State Board of Education’s rules and regulations for special education at 511 IAC 7-17 *et seq.* (“Article 7”). This, however, is a law regarding the provision of special education and related services to students with disabilities. This is not a civil rights law, nor does it include all students with disabilities. The principal federal non-discrimination laws affecting students with disabilities who are enrolled in Indiana public schools are Sec. 504 of the Rehabilitation

Act of 1973, 29 U.S.C. §794, as implemented by 34 CFR Part 104, and the Americans with Disabilities Act of 1990, Title II of same. 42 U.S.C. §12101 *et seq.*

The vast majority of Respondent's member schools are publicly funded schools. In this case, Petitioner attends a public school that receives federal funds for educational purposes. As a recipient of federal educational funds, Petitioner's school must ensure that it complies with Section 504 and Title II of the A.D.A.⁵ This includes providing access to its programs and services, as well as providing reasonable accommodations or modifications when necessary to do so. This would include athletics. See, for example, 34 CFR §104.37(c). A recipient cannot avoid its responsibility by entering into a contract with a third party or otherwise delegating a responsibility to a third party non-recipient through licensing or other similar arrangements. See §104.4(a), (b). The Petitioner, in order to prevail, would have to show that she has a substantial limitation on a major life activity, §104.3(j), and that she is a "qualified person with a disability" under §104.3(k).

Respondent's "Age Rule" has already been found to bear a rational relationship to legitimate interest: (1) protect the health and safety of young student athletes; (2) foster competition; and (3) eliminate "redshirting." Thomas v. Greencastle Comm. Sch. Corp., 603 N.E.2d 190, 193-94 (Ind. App. 1992). The court in Thomas found that the "Age Rule" did not employ suspect criteria that would target any identifiable group. The court also acknowledged that "There will always be people who fall minutes, even seconds, outside of the established [time] line." At 194. Although Thomas involved a student with a learning disability who was retained in the second grade, the implications of federal law were not involved in the decision. For that reason, other sources are visited for guidance in this regard.

The Office for Civil Rights (OCR) of the U.S. Department of Education enforces all anti-discrimination laws where a recipient of federal education funds is involved. This includes Sec. 504 and the A.D.A., Title II. OCR has issued several policy directives with respect to athletic competition dating from 1978. With respect to "Age Rules," OCR has indicated that such rules are based upon physiological principles and are not discriminatory *per se*. California Department of Education, Education of the Handicapped Law Report (EHLR) at 257:239 (OCR 1981); Maine Department of Educational and Cultural Services, EHLR at 258:31 (OCR 1985). However, a recipient's past failure to timely identify a student's disability and provide appropriate educational services, which in turn results in a student's present disqualification from participation in interscholastic sports, could result in a present discriminatory effect, thus prohibiting the recipient from abiding by the age limitation by-law. OCR Policy Interpretation No. 5, EHLR at 251:03 (OCR 1978); New Mexico State Department of

⁵The analysis herein will refer to the regulatory scheme for implementing Sec. 504. The effect of Sec. 504 and Title II, A.D.A. will be the same for a public school with respect to this issue. For the applicable definition for "recipient," see §104.3(f).

Education, 18 *Individuals with Disabilities Education Law Reporter* (IDELR) 219 (OCR 1991).⁶ Also see OCR Policy Construction *OSPR I/1/47*, EHLR at 259:06 (OCR 1979), noting that although OCR had no enforcement authority over a non-recipient athletic association, OCR did have enforcement responsibilities with respect to the member high schools that were recipients. In this case, an “Age Rule” was involved.

The rule of the State high school athletic association is neutral on its face and, therefore, is not *per se* discriminatory. Its effect in particular situations, however, may be. If the reason that a particular student is nineteen years old at the beginning of his or her senior year is that the school system discriminated against that student on the basis of handicap, the rule may not be applied to that student. For example, it would be discriminatory for a high school to deny interscholastic athletic opportunities to a deaf person who was over the age limit if the reason that the person had passed this limit was that the school system required all deaf students to repeat the first and second grades.

There have been a number of judicial determinations in this respect. One of the more recent and expansive treatments of an association’s “Age Rule” and allegations of discriminatory effect can be found at Sandison v. Michigan High School Athletic Ass’n, Inc., 64 F.3d 1026 (6th Cir. 1995). In this case, students who had been retained earlier in their school careers for unspecified learning disabilities found themselves unable to compete in interscholastic sports sanctioned by Michigan’s athletic association. Plaintiffs asserted that the Age Rule, which is more restrictive than Respondent’s version, resulted in a present discriminatory effect. The 6th Circuit Court of Appeals rejected their claims under Sec. 504 and the A.D.A., finding that the age restriction was applied to all students, with or without disabilities, and that the requirements of Sec. 504 and the A.D.A. were to ensure equal opportunities to participate in athletics. Waiving the Age Rule would not be a reasonable accommodation, the court found. This was a much-publicized case. Although it is not binding upon the CRP, the decision is instructive in the method of analysis utilized by the court.

There have been other cases that are likewise instructive, although one should be cautioned that each decision is fact sensitive. See, for example, Dennis v. Conn. Interscholastic Athletic Conference, 913 F.Supp. 663 (D. Conn. 1996), granting an injunction to permit a student with a disability to compete in swimming notwithstanding his inability to satisfy the Age Rule. The failure to waive the Age Rule for this

⁶In Maine, OCR held that the association’s “Age Rule” was neutral on its face and its purpose—to prevent older, more experienced athletes from gaining an advantage over younger athletes in contact sports—was legitimate and non-discriminatory. OCR added that such an ostensibly neutral and non-discriminatory rule would be upheld except where it is shown that past discrimination resulted in the student presently being over the age limit. The evidence did not support such a finding in this instance.

student, the court found, violated Sec. 504 and the A.D.A. Such a waiver would be a reasonable accommodation. Other cases finding in favor of the student include Pottgen v. Missouri State High School Activities Assoc., 857 F.Supp. 654 (E.D. Mo. 1994), reversed on other grounds, 40 F.3d 926 (8th Cir. 1996), finding the student had demonstrate a hardship such that the Age Rule should be waived; University Interscholastic League v. Buchanan, 848 S.W.2d 298 (Tex. App. 1993), finding for students with learning disabilities, noting that this disinclination of the organization to recognize exceptions to its Age Rule failed the “reasonable accommodation” requirements of non-discrimination laws; Johnson v. Florida High School Activities Assoc., Inc., 899 F.Supp. 579 (M.D. Fla. 1995), applying a case-by-case analysis, as urged by other courts, and finding that the possibility of waiving the Age Rule is a form of reasonable accommodation; and Tiffany v. Arizona Interscholastic Ass’n Inc., 726 P.2d 231 (Ariz. App. 1986), finding that the association’s failure to consider hardship for a student who did not satisfy its Age Rule was unreasonable, arbitrary, and capricious.

Cases that have upheld the Age Rule, besides Sandison supra, include M. H. Montana High School Ass’n, 929 P.2d 239 (Mont. 1996), where the student did not demonstrate he was a “qualified” person with a disability in order to invoke discrimination analysis and application.

As a result of the above—and cognizant of the State entity status of the CRP—the CRP cannot be restricted in its student eligibility decisions to limitations the Respondent places upon itself. Indiana law does not require such restrictions and did not authorize Respondent to place such restrictions on the CRP. A properly presented case could result in a waiver of the Age Rule by the CRP.⁷

Based on the testimony at the hearing as well as the record before the Case Review Panel, the following Findings of Fact, Conclusions of Law, and Orders are determined.

FINDINGS OF FACT

1. Petitioner is a senior at Lewis Cass High School in the Southeastern School Corporation. She has attended the high school all four years. She is an active member of her school. Although softball is her primary athletic interest where she has played catcher, she has also served as manager for the school’s volleyball team and played basketball until her senior year. She did not play basketball this year because her school program included a work experience program that has enabled her to attain practical experience in landscaping. She intends to attend Vincennes University next year and major in Landscape/Horticulture. She is also in the school’s Pep Band, Marching Band, and Concert Band. She also participates in the Future

⁷It should be noted that the Petitioner does not allege that she is a qualified person with a disability. This discussion and determination are to resolve the nature of the Case Review Panel and its statutory responsibilities as these relate to the By-Laws of the Respondent.

Farmers of America (FFA) program, where she is the treasurer. She has been able to make the honor roll at her school the past three years and has been invited to be a member of the National Honor Society (NHS). She is presently 19 years old and will turn twenty years of age on March 22, 2001.

2. Petitioner stands 5' 7" tall and possesses an athletic build. She has participated on summer league teams. Last year, while playing for her high school team, she batted over .300 and was selected to the all-conference second team. She acknowledges that she was aware of Respondent's Age Rule.
3. Although Findings of Fact Nos. 1 and 2 would appear to reflect a successful student for a long period of time, such has not been the case. Petitioner struggled early in her academic experiences. She had difficulties in reading. After kindergarten, she was placed in a transitional K-1 class. First grade did not present significant difficulties, but Petitioner again struggled in second grade. She repeated the second grade. She was referred for evaluation to determine whether she required special education and related services. However, she was not found eligible for these services. Her parents, who are very involved and supportive, sought assistance from a learning specialist in Indianapolis.⁸ The learning specialist advised that Petitioner did not have a learning disability but did have learning problems that would be manifested in reading, spelling and math. He provided suggested exercises to assist in improving her skills in reading, writing, and spelling. Her parents also sought tutorial assistance for her.
4. Petitioner continued to experience academic difficulties, which was also causing Petitioner some anxiety. She was seen by a neuropsychologist in Indianapolis, who evaluated her and reiterated recommendations earlier made by the learning specialist. Petitioner has made "slow but steady progress" for the past six years. Unfortunately, the early grade retentions will result in her being twenty (20) years old before the softball tournament.
5. The state softball tournament finals for girls' softball begins on June 8, 2001, rendering Petitioner ineligible by application of **Rule C-4-1**. Respondent represented that the purposes behind the Age Rule are, in pertinent part, to ensure the health and safety of participating athletes. A twenty-year-old student is likely to be more mature physically than younger students, especially 14-year-old softball players who could face Petitioner. Petitioner is a

⁸The learning specialist did not prepare a written report. His findings and recommendations were included on a cassette tape that Petitioner had provided Respondent during the initial evaluation of her request for eligibility. The tape was not included in the record forwarded to the CRP from the Respondent. Petitioner, however, believes that the contents of the report are included in a later written report by a neuropsychologist during Petitioner's seventh grade year.

catcher, a position that is associated with contact at the home plate, sometimes with resulting injuries. Petitioner is not in a non-contact sport and plays a position that requires contact.

CONCLUSIONS OF LAW

1. Although the IHSAA, the Respondent herein, is a voluntary, not-for-profit corporation and is not a public entity, its decisions with respect to student eligibility to participate in interscholastic athletic competition are considered “state action,” and for this purpose makes the IHSAA analogous to a quasi-governmental entity. *IHSAA v. Carlberg*, 694 N.E.2d 222 (Ind. 1997), *reh. den.* (Ind. 1998). The Case Review Panel has been created by the Indiana General Assembly to review final student eligibility decisions with respect to interscholastic athletic competition. P.L. 15-2000, adding I.C. 20-5-63 *et seq.* to the Indiana Code. The Case Review Panel has jurisdiction when a parent, guardian, or eligible student invokes the review function of the Case Review Panel. In the instant matter, the IHSAA has rendered a final determination of student-eligibility adverse to the student. The student has timely sought review. The Case Review Panel has jurisdiction to review and determine this matter.
2. Any Finding of Fact that may be considered a Conclusion of Law shall be so considered. Any Conclusion of Law that may be considered a Finding of Fact may be considered as such.
3. Respondent’s Age Rule is, *per se*, a legitimate rule that promotes important facets of athletic competition, such as the health and safety of student-athletes. Such physiological considerations bear a rational relationship to the promotion of the health and safety of participating athletes.
4. Petitioner will be twenty years of age prior to the start of the state tournament. As such, she will be ineligible for competition due to the application of **Rule C-4-1**. Although Petitioner reached this age due to academic difficulties and not for athletic purposes (i.e., “redshirting”), she is not in a protected category for application of federal laws designed to ensure that such by-laws do not contribute to a present discriminatory effect based upon a past discriminatory action.

ORDER

The decision of the Indiana High School Athletic Association to deny Petitioner eligibility to participate in softball due to application of its Age Rule is upheld. The vote of the Case Review Panel in this regard was 7-0.

DATE: March 7, 2001

/s/ John Earnest, Chair
Case Review Panel

APPEAL RIGHT

Any party aggrieved by the decision of the Case Review Panel has thirty (30) calendar days from receipt of this written decision to seek judicial review in a civil court with jurisdiction, as provided by I.C. 4-21.5-5-5.